APPENDIX

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Excerpts from Opinion in City of Philadelphia v. Chas. Pfizer & Co., Inc. (345 F.Supp. 454, March 31, 1972) Stating Fee Criteria and Describing Role of Dickstein, Shapiro & Galligan in This Litigation

WYATT, District Judge.

This is a petition by Harold E. Kohn (and by other counsel associated with him), attorney for plaintiffs in these class actions, for an order approving a fee of $2,000,000, to be paid by defendants to Kohn and his associates. The petition is undated but was submitted in open Court on January 24, 1972 in the presence of counsel for defendants and was at that time ordered by me to be filed and docketed. Mr. Kohn and counsel for defendants were heard on that occasion. Decision on the petition was reserved.

Mr. Kohn is an experienced lawyer in antitrust matters; his office is in Philadelphia. He personally took the active part amongst the petitioners; he and his associate, Miss Korman (one of the petitioners) are known to me from their appearances before me; the other petitioners are not known to me and I am not personally aware of any relevant activity by them.

A "Supplement to Petition", also undated, was thereafter mailed to the Clerk and was received for filing on February 14, 1972.

The caption of the petition shows three civil actions in which Kohn represents the plaintiffs. Apparently, notice of the petition was given to defendants only. When the petition was heard, only defendants were represented and had been notified.

I. Commencement of the Actions Now Being Settled

A. Commencement of Actions Before Verdict in the Criminal Case

The extensive background of these three class actions and many similar actions need not be here reviewed in detail. It is described in my opinions in State of West Virginia v. Chas. Pfizer & Co., D.C., 314 F.Supp. 710, affirmed 2 Cir., 440 F.2d 1079, and in Hartford Hospital v. Chas. Pfizer & Co., D.C., 52 F.R.D. 131 (see on appeal from denial of motion to intervene, American Hospital Assn. v. Chas. Pfizer & Co., 2 Cir. 448 F.2d 790).

For present purposes, the history may begin with the filing on August 17, 1961 of an indictment in this District naming Pfizer, Cyanamid and Bristol as defendants (61 Cr. 772) along with some individuals, whose motions to dismiss were subsequently granted (United States v. Chas. Pfizer & Co., D.C., 245 F.Supp. 801). The indictment charged violation of the antitrust laws in respect of broad spectrum antibiotic drugs. It was some time before any civil claim was asserted against defendants. In time, however, many similar civil actions were commenced. All of these actions not commenced in this District were transferred here by the Judicial Panel on Multidistrict Litigation.

1.

In 1963, Premo Pharmaceutical Corporation (Premo), a drug business operating from New Jersey, began to import tetracycline from Italy. Pfizer on September 20, 1963 commenced an action for patent infringement against Premo in the United States District Court for the District of New Jersey (C.A. 766-63). Premo filed in that action a counterclaim asserting violation by Pfizer of the antitrust laws. Premo then retained a lawyer, Dennis, to assist patent counsel in prosecuting the counterclaim.

2.

In the following year, 1964, Premo was low bidder for sales of tetracycline to the City of New York but, since Pfizer had threatened the City with a patent infringement suit if it bought from Premo, the City in buying from Premo required Premo to post an indemnity bond. By this time, Dennis had become a partner in the law firm of Dickstein, Shapiro & Galligan. Premo consulted this firm in connection with the furnishing of the indemnity bond to the City.

In June 1964, Pfizer commenced an action in this Court against the City of New York and against the surety on Premo's indemnity bond; the complaint alleged infringement of the Conover patent. This is an action still pending (64 Civ. 1742).

The defendant City of New York retained as its counsel Dickstein, Shapiro & Galligan; on July 1, 1964, these lawyers filed an answer. This answer contained a counterclaim asserting a cause of action for treble damages against Pfizer, Cyanamid, Bristol, Squibb and Upjohn for violation of the antitrust laws. The counterclaim was based on the charges in the indictment and in substantial part is word for word copied from the indictment. The counterclaim did not set out any claim for a class. Mr. Shapiro and Mr. Galligan have not only been active in the City of New York action but, as will appear, have been active in many other actions involving antibiotic antitrust claims.

3.

It was some time before any claim similar to that of the City of New York was asserted against defendants. (On July 13, 1964, Premo commenced an action in this Court (64 Civ. 2163) against the defendants other than Pfizer.)

In November 1966, the Shapiro firm negotiated a settlement of the Premo litigation. A chief feature of the

settlement was a license by Pfizer to Premo and two other companies to make, sell, etc. tetracycline. This license, according to Shapiro and as agreed implicitly by all other counsel for plaintiffs, marked the end of the claimed antitrust law violations.

4.

On August 4, 1967, the State of Texas commenced an action in the Northern District of Texas (CA 3—2165; after transfer here, 68 Civ. 4375). The Shapiro firm was of counsel. This was the first action commenced by a plaintiff to assert treble damage antitrust claims against defendants. It was a class action for the State of Texas and all cities, counties, and other political subdivisions in Texas which had bought antibiotics during the relevant period. (City, county and state entities are, in the context of these actions, often called "CCS" entities and the actions are often called "CCS" actions.)

5.

In August 1967, Pfizer commenced a patent infringement action in the Central District of California (67-793-R; after transfer here, 68 Civ. 4541) against Benalen Corporation, a wholesale drug house. On August 24, 1967, Benalen filed an answer with a counterclaim for violation of the antitrust laws. The counterclaim as then filed did not state a claim for a class. On September 18, 1967, Benalen filed an amended counterclaim which did assert the antitrust claim for a class of all drug wholesalers in California who had bought and resold antibiotics at wholesale in the relevant period. This was the first civil antitrust claim asserted against defendants by a wholesale druggist. Counsel for Benalen have been Schwartz & Alschuler, for whom Benjamin F. Schwartz and Herbert A. Karzen have been principally engaged.

6.

On September 18, 1967, Domaro, a California retail druggist, commenced an action against defendants in the Central District of California (67-1366-R; after transfer here, 68 Civ. 4542). The Schwartz firm represented Domaro. The claim was stated for a class of all retail druggists in California who bought and resold antibiotics at retail in the relevant period. This was the first civil antitrust claim asserted against defendants by a retail drug store.

7.

On September 18, 1967, American Medical Enterprises, which had hospitals in California, commenced an action against defendants in the Central District of California (67-1365-R; after transfer here, 68 Civ. 4543). The Schwartz firm represented American Medical Enterprises. The claim was stated for a class of all private hospitals in California who bought and resold or dispensed antibiotics to their patients in the relevant period. This was the first civil antitrust claim asserted against defendants by a private hospital.

8.

On October 23, 1967, trial of the indictment began in this Court before Judge Frankel.

On October 25, 1967, the State of Florida commenced an action in this Court (67 Civ. 4143). The Shapiro firm was of counsel. The claim was for a class of all CCS entities in Florida which had bought antibiotics during the relevant period or had paid for antibiotcs under welfare, old age or other relief programs.

On December 29, 1967, the jury brought in a verdict of guilty against the three defendants named in the indictment.

B. Commencement of Actions After Verdict in the Criminal Case Until the February 6, 1969 Settlement Offers of Defendants

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[Description of the Various Cases]

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II. Summary of the Actions Commenced Through February 6, 1969

The class actions commenced through February 6, 1969 and with which we are concerned may be divided into three groups: (A) by CCS entities, for public hospitals and in a number of actions for individual consumers; (B) by retail and wholesale druggists for a class of retail and wholesale druggists; and (C) by private hospitals for a class of private hospitals, both non-profit and proprietary.

A. Actions by CCS Entities

By February 6, 1969, 44 actions had been commenced by CCS entities (one of which was by way of counterclaim).

Shapiro represented the largest number of these, twenty: Alabama, Florida, Georgia, Iowa, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Texas, Virginia and Wisconsin; Cities of New York (counterclaim plaintiff) and Memphis.

Freeman represented plaintiffs in nine of the CCS actions: Colorado, Illinois, Indiana, Michigan, New Hampshre, Pennsylvania, West Virginia; City of Chicago; Metropolitan Government of Nashville and Davidson County.

Goldberg represented plaintiffs in eight of the CCS actions: Connecticut, Idaho, Maryland, New Jersey, New Mexico, and Wyoming; City and County of Denver; Mayor and City Council of Baltimore.

Kohn represented the plaintiffs in one of the CCS actions, that commenced by the City of Philadelphia and City of Detroit (see (11) above). The State of Delaware, the County of Erie (New York), and the Cities of Cleveland and Akron, Ohio, had moved to intervene in this action.

In three of the CCS actions—those by Arkansas, New York, and South Carolina—the plaintiffs were represented by their respective Attorneys General.

In the remaining three of the CCS actions—those by Boston, Maricopa County and Puerto Rico—the plaintiffs were represented by private counsel.

B. Actions by Wholesale and Retail Druggists

By February 6, 1969, eleven actions had been commenced by retail drug stores and by wholesale druggists (one of which was by way of counterclaim).

The Ben Schwartz firm represented the plaintiff in one action and the counterclaiming defendant in another action.

Two of the actions, those begun in or removed to the Southern District of Florida, were duplicative.

In the other actions, separate privately retained attorneys represented the plaintiffs in each action.

Freeman represented the plaintiff in one such action (see (33) above), but withdrew by permission in an order filed April 11, 1969.

Leo Schwartz represented the plaintiff in one such action; he also represented the City of Boston, a plaintiff in one of the CCS actions (see (15) above).

Except as indicated, no lawyer for a plaintiff in the actions by druggists was acting for a plaintiff in a CCS action. Kohn—who represented plaintiffs in one CCS action—later appeared for plaintiffs in a class action for

retail drug stores commenced on March 26, 1969 (see (83) within).

C. Actions by Private Hospitals

By February 6, 1969, fifteen actions had been commenced by private hospitals. One of these (see (60) above) did not state any claim for a class.

Two of the actions, those begun in or removed to the Southern District of Florida, were duplicative. They also combined in one action claims for a class of drug stores and for a class of private hospitals; these claims were later severed from each other.

Kohn represented plaintiffs in one of the private hospital actions (see (19) above).

III. Negotiation of the February 6, 1969 Settlement Offers of Defendants

The defendants made and announced their settlement offers on February 6, 1969. There were two separate offers:

(1) an offer of $100,000,000 in settlement of all claims of CCS entities, wholesalers, retailers, and individual consumers; and

(2) an offer of $20,000,000 in settlement of all claims of private hospitals, of all claims of entities who reimbursed private hospitals, and of all other claims (except those covered by the $100,000,000 offer).

It seems reasonably clear that the $100,000,000 offer was principally negotiated by Shapiro (and Galligan is understood to be included in a reference to Shapiro), with considerable assistance from Freeman, and with some assistance from Goldberg and Kohn.

The impression made by Kohn's petition is that he alone negotiated the settlement offers, that he was forced by defendants to keep the negotiations confidential from

other counsel for plaintiffs, that Kohn proposed the technique of settlement, and that in September 1968 "counsel for defendants informed [Kohn] they had decided his proposals were feasible and had been favorably considered by them" (petition, p. 7). This impression is not believed to be in accord with the facts. While Kohn may have greatly helped to induce defendants to make the settlement offers, others also helped to achieve this result and the contributions of others, notably Shapiro and Freeman, are believed to have been greater than that of Kohn.

Kohn appears to have begun settlement discussions with Stewart (of counsel to Pfizer) on February 28, 1968 and to have continued these during the months through September 1968. Kohn appears to have concentrated on Pfizer.

Shapiro began to discuss settlement with McDonald (of counsel to Cyanamid) on April 12, 1968 and to have continued such talks through September 1968. Shapiro appears to have concentrated on Cyanamid.

A major obstacle to settlement was raised by Cyanamid counsel with Shapiro. This was the effect on the "passing-on" defense of the decision in Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231, handed down on June 17, 1968. This caused Cyanamid to fear claims of wholesale and retail druggists and to insist not only that these be specifically included in any settlement but that their impact be diminished.

It was Shapiro who overcame this obstacle. In September 1968, he developed theories of law supporting claims of the CCS entities as parens patriae for individual consumers in their areas and by such CCS entities as class representatives for a class of individual consumers. A memorandum on these theories was sent by Shapiro to Cyanamid counsel under date of October 8, 1968. These theories have also already been noted in the action commenced by Kentucky[1]

[1] Shapiro was counsel in this action.

on November 12, 1968 (see (41) above); they appeared in other actions commenced thereafter and they appeared by amendment in actions earlier commenced. See in this connection Hawaii v. Standard Oil Co. of Calif., 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972).

Kohn appears to have proposed one settlement offer by defendants of all the claims, of whatever character—CCS entities, wholesalers, retailers, consumers, private hospitals and every other kind of claimant; according to Shapiro, this was "the concept of a global settlement" (Dec. 1, 1971 affidavit, p. 44). Shapiro, Freeman and others opposed this; they insisted that there should be a separate settlement with CCS entities. What evolved was something different from the Kohn "global settlement" and not quite what Shapiro and Freeman were urging. The $100,000,000 offer was for all CCS, wholesaler, retailer and consumer claims; the $20,000,000 offer was for all private hospital and all other claims.

Information about the settlement negotiations from the side of the defendants comes from an affidavit, sworn to March 19, 1970, of Roy W. McDonald, Esq., of counsel to Cyanamid. Mr. McDonald says that the settlement meetings in which he and his firm participated were "predominantly" with Shapiro and Galligan, that Freeman was present "on numerous occasions", that Goldberg and Kohn were present "at some of these meetings", and that Goldberg and Kohn were each present "at one or more conferences with defense counsel" at which Shapiro, Galligan and Freeman were not present. Mr. McDonald further tells us that between October 15, 1968 and February 1, 1969 there were 15 meetings about settlement with Shapiro and Galligan, that Freeman was present at 10 of these, that Kohn was present at 3, and that Goldberg was present at 2; McDonald also says that there were "three additional meetings" with Kohn (presumably it was at these meetings

that the agreement between defendants and Kohn was worked out).

According to Kohn, "counsel for defendants" in September 1968 agreed that Kohn could inform Shapiro of the "progress of the negotiations" and invite Shapiro to join in "the settlement" for his (Shapiro's) clients. If this is a suggestion that there was a "settlement" in September 1968 and that Kohn had caused it, the suggestion must be rejected in both aspects. It may be that in or shortly after September 1968, there was a merger of the Kohn-Pfizer and Shapiro-Cyanamid negotiations. Beginning October 15, 1968, the negotiations for settlement were both broader and more intense; these ended in the February 6, 1969 offers.

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IV. The Agreement Between the Defendants and Kohn

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V. Commencement of Private Hospital Actions After February 6, 1969

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VI. Negotiation of the April 3, 1970 Settlement Offer by Defendants to Private Hospitals

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VII. Procedural Steps After the April 3, 1970 Settlement Offer, in Private Hospital Actions

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VIII. Services Performed by Kohn

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IX. The "Fair and Reasonable Value" of Kohn's Services

The task now presented to the Court is a heavy one. It is to determine the "fair and reasonable value" of the services of Kohn as counsel in the actions of "various plaintiffs" against defendants (February 6, 1969 letter). * * * The parties have not agreed on the "fair and reason-

able value" and thus under the agreement it must be determined by the Court.

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The problem in an antitrust context is perceptively discussed (and the principal cases collected) by Judge Metzer in Trans World Airlines, Inc. v. Hughes, 312 F.Supp. 478 (S.D.N.Y. 1970), affirmed as part of a final judgment 449 F.2d 51, 79 (2d Cir. 1971), cert. granted, 405 U.S. 915, 92 S.Ct. 960, 30 L.Ed.2d 785 (1972).

Judge Harvey on April 28, 1972 filed a careful opinion on the subject, which opinion among many others has been studied by me. Lindy Bros. etc. v. American Radiator etc., Civ. No. 41774SC (E.D.Pa).

More recently on May 2, 1972, Judge Decker also filed a careful opinion on the subject and his opinion has also been studied by me. Illinois v. Harper & Row, 67 C 1899 (N.D.Ill.).

Our Court of Appeals in TWA v. Hughes, above, cited with approval the discussion in a District Court opinion on which Judge Metzner relied and from which he quoted, namely, Hanover Shoe, Inc. v. United Shoe Mach. Corp., 245 F.Supp. 258, 302 (M.D.Pa. 1965), vacated on other grounds, 377 F.2d 776 (3d Cir. 1967), aff'd in part on other grounds, rev'd in part on other grounds, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968). In the District Court opinion just cited, Chief Judge Sheridan lists some of the factors to be considered as these:

"(1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government,

(2) the standing of counsel at the bar—both counsel receiving the award and opposing counsel,

(3) time and labor spent,

(4) magnitude and complexity of the litigation,

(5) responsibility undertaken,

(6) the amount recovered,

(7) the knowledge the court has of the conferences, arguments that were presented and of work shown by the record to have been done by attorneys for the plaintiff prior to trial,

(8) what it would be reasonable for counsel to charge a victorious plaintiff."

It may be noted that these factors were being applied in an action tried to the court without a jury where plaintiff was awarded substantial damages after trial. There is no mention of the factor of contingency of compensation which is one also to be considered where it exists.

The Code of Professional Responsibility of the American Bar Association states that factors "to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent."

Whether mentioned specifically hereafter or not, I have tried to take into account the several factors referred to above.

102.

[Enumeration of Petitioners' Hours]

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103.

Counsel for all plaintiffs in all antibiotics actions had the benefit of extensive government investigations and proceedings, including the indictment returned on August 1961 (see 314 F. Supp. at 714-720).

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104.

As already indicated, Kohn is accepted as an able and experienced antitrust specialist who has a high standing at the bar. In the settlement negotiations resulting in the February 6, 1969 offers, Kohn "greatly helped", as stated above. But he did not by his own efforts bring about the settlement as to the CCS entities; he was among a number of the contributing causes. As to the February 6, 1969 private hospital settlement offer, Kohn advocated a settlement for this $20,000,000 offer; others later persuaded the defendants to offer $32,500,000.

The great help to the plaintiffs from the prior criminal and other government investigations is a reducing factor to be taken into account in determining the reasonableness of fees for counsel to plaintiffs in these and other similar actions (Code of Professional Responsibility, American Bar Association, Canon 2, EC-2-18, DR 2-106(B) (1)), just as the contingency of the compensation is an increasing

factor also to be taken into account (Code of Professional Responsibility, American Bar Association, Canon 2, EC-2-18, DR 2-106(B) (8)).

Aside from the negotiations with defendants and the concepts employed in them, there appear to have been no novel or difficult questions to which the services were addressed.

105.

The claims of the plaintiffs represented by Kohn were of considerable magnitude and their recovery under the settlements are substantial in amount.

In the City of Philadelphia action, the clients of Kohn will receive some $3,150,000, less whatever is allowed for administrative expenses and for counsel fees and expenses.

In the private hospital cases, the clients of Kohn, it is estimated by him, will receive some $160,000, less allowances as above.

It is not shown how much was recovered by the clients of Kohn in the other actions in which he acted, but it is assumed for present purposes that the recoveries were, or will be, substantial.

Of course, the CCS entity actions in the aggregate involve the recovery of in excess of $80,000,000 and the private hospital actions in the aggregate involve the recovery of in excess of $21,000,000; these figures, however, are no proper measure of a fee to Kohn, if for no other reason because he did not himself create those funds; to the extent that he "greatly helped", this has been taken into account.

106.

The 25% contingent fee agreements to which Kohn was a party have been given consideration but they do not greatly affect my conclusion as to the fair and reasonable value of the services performed. The views expressed by

Judge Decker in the *Harper & Row* opinion, above cited, seem to me to be correct:

> "I have some difficulty accepting the premise that a contingent fee contract on a fixed percentage basis will ultimately result in a reasonable and fair fee because some of the plaintiffs have approved it. These contracts are entered into before any services have been performed and generally provide for a fixed percentage fee whenever a case is settled, without any reference to the quality of the services rendered or the time and effort required to effect the settlement. As the size of class action settlements increases, with millions of dollars involved in some cases, the fallacy of adhering to a fixed percentage fee formula becomes more evident."

[2] It is ordered that the fair and reasonable value of the services of Kohn is $600,000.

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